

## EMPLOYER STATUS DETERMINATION

### PACIFIC STANDARD CORPORATION

This is a decision on reconsideration of the employer status of Pacific Standard Corporation (PSC). PSC was found to be an employer under the Acts in Legal Opinion L-91-125 and timely filed for reconsideration of that decision.

PSC is wholly owned by Centrail Partnership, a partnership comprised of Mr. Nicholas B. Temple and Washington Central Railroad Company (hereafter WCRC). WCRC is a carrier by railroad, which at its inception operated approximately 433 miles of track in the state of Washington. See ICC Finance Docket No. 308876. WCRC has been held to be an employer under the Acts (BA No. 3651) since October 12, 1986. See Legal Opinion L-86-132.

WCRC has a 40 percent interest in the partnership which owns PSC, and Mr. Temple has a 60 percent interest in the partnership. Mr. Temple is the sole shareholder of WCRC. He is the president and a director of WCRC and PSC. Ms. Patricia Temple is the secretary/treasurer and a director of each company. Each company has a two-member board of directors.

In L-91-125 the Deputy General Counsel found that PSC was under common control with WCRC, a finding that PSC does not dispute. In addition, the Deputy General Counsel found that PSC was performing

services in connection with the transportation of person or property by railroad based on the fact that 31% of PSC's revenue and 36.67% of its staff time was related to car repair and other support services performed for its affiliate WCRC. In addition, the Deputy General Counsel noted that PSC received substantial revenues from other railroad for mechanical repair and railroad construction. Based upon these findings the Deputy General Counsel found that PSC was an employer under section 1(a)(1) of the Railroad Retirement Act (RRA) and its companion section under the Railroad Unemployment Insurance Act (RUIA).

Section 1 of the RRA defines the term "employer" to include:

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which in connection with the transportation of passengers or property by railroad.

[45 U.S.C. § 231(a)(a)(i) and (ii)].

Section 1 of the RUIA contains essentially the same definition.

Section 202.7 of the Board's regulations provides in pertinent part that service is considered to be service in connection with railroad transportation:

. . . if such service or operation is reasonably directly related, functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. [20 CFR 202.7].

Section 202.6 of the Board's regulations (20 CFR 202.6) defines casual service as "service [which] is \* \* \* irregular or infrequent \* \* \* or \* \* \* whenever such service \* \* \* is insubstantial."

Although it does not dispute the factual findings of the Deputy General Counsel PSC argues on reconsideration that based upon the holding in Standard Office Building v. United States, 819 F. 2d 1371 (7th Cir. 1987) that the Deputy General Counsel incorrectly concluded that as a matter of law that it was an employer under the Acts.

Standard Office Building (SOB) was owned by the Atchinson, Topeka and Sante Fe Railway and operated a building in which the railroad had approximately 57% occupancy. SOB employees maintained the building in holding that SOB was not performing a service in connection with transportation the court relied on a number of factors peculiar to SOB. First, the court noted that SOB was

formed long before the existence of the railroad retirement system, and that Sante Fe's was initially only a minor tenant in the building. Furthermore, none of the employees of SOB had ever been covered under railroad retirement nor did they belong to any railroad unions. The services SOB employees performed were not inherently railroad related and could be easily be contracted out. The court cautioned that its decision might have been different if SOB was formed by Sante Fe after the inception of railroad retirement or if Sante Fe was the sole tenant of the building.

In contrast, PSC was formed by a partnership consisting of a railroad covered under the Acts and the sole shareholder of that railroad for the purposes of performing railroad related services such as car repair, locomotive repair, maintenance of way, railroad construction and tourism (operating of a dinner train). Unlike SOB it has actively solicited business from common carrier railroads, in addition to, private carrier railroads, governmental bodies and private industry.

Clearly controlling in this case is Livingston Rebuild Center, Inc. v. Railroad Retirement Board, 970 F. 2d 295 (7th Cir. 1992). Livingston rebuilt and repaired locomotives and other rolling stock. About 25 percent of its business was with its affiliated carrier. The court found these activities services in connection with the transportation of property by rail.

Just as in Livingston, PSC is under common control with a carrier. Likewise, as in Livingston, a substantial amount of railroad related services, about 30% in terms of total revenue, are performed by PSC for its affiliated carrier. PSC argues on reconsideration that, unlike Livingston's, PSC receives a substantial portion of its revenues from nonrailroads. Although this statement does not square with the facts provided earlier by PSC, even if accurate, the result would be the same. There is nothing in Livingston to suggest that its outcome hinged entirely upon the fact that 90% of Livingston's business was with railroads. What Livingston does teach us, however, is that the beginning of the analysis in determining the employer status of an entity under the Acts is the text of the relevant statutes. Where, as in this case, the entity concedes that it is in common control with a railroad and where it performs services which are essential to railroad transportation and where such service are not casual, then it is clearly performing services in connection with the transportation of property by railroad and is covered under section 1(a)(1)(ii) of the RRA and its companion section in the RUIA.

The Board finds that PSC has been a covered employer under the Acts since January 1, 1987. Reconsideration is denied.



Board

General Counsel

Reconsideration of Employer Status of Pacific Standard Corporation

Attached is a proposed decision on reconsideration holding Pacific Standard Corporation an employer under the Acts.